SUPREME COURT, U. S
NOV 10
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74—376.

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

Petitioners,

v.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondent.

Brief of Petitioners in Reply to Opposing Brief of Respondent, Central School District No. 1 of the Towns of Conklin, Binghamton, Kirkwood and Vestal, Broome County, New York.

BERNARD F. ASHE,
Attorney for Petitioners,
80 Wolf Road,
Albany, N. Y. 12205

JAMES R. SANDNER,
ROCCO A. SOLIMANDO,
IVOR R. MOSKOWITZ,
Of Counsel,
80 Wolf Road,
Albany, N. Y. 12205

Table of Contents.

	Page
Statement	1
POINT I. The action of the Appellate Division, Third Department, as a practical matter, did finally determine the action between the parties and is therefore reviewable by this Court under 28 U.S.C. Section 1257(3)	2
POINT II. The controversy presented herein is not moot, but still in active litigation	6
POINT III. Merely because a state may act to enjoin picketing in connection with the alleged violation of a state law does not give either that state or its courts the right to extend injunctive relief in such a manner as to chill the exercise of First Amendment freedoms	8
POINT IV. The temporary restraining order and preliminary injunction granted against petitioners was void under New York law	9
CONCLUSION. For the reasons cited in petitioners' petition for a writ of certiorari and those cited herein, this Court should grant certiorari	12

TABLE OF CASES.

	Page
Adderley v. Florida, 385 U. S. 39 (1966)	8, 9
Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza, 391 U. S. 308 (1968)	4, 5
American Radio Assn. v. Mobile Steamship Assn., Inc., No. 73-748, cert. granted 2/25/74	6
Bond Stores, Inc., v. Turner, 262 App. Div. 417, 29 N. Y. S. 2d 82 (3rd Dept. 1941)	4
Cox v. Louisiana, 379 U. S. 536 (1965)	8, 9
DeFunis v. Odegaard, U. S. , 94 S. Ct. 1704 (1974)	7
Giboney v. Empire Storage and Ice Co., 336 U. S. 490 (1949)	8
Laborer's Local 438 v. Curry, 371 U. S. 542 (1963)	5
Montgomery Building and Construction Trades Council v. Ledbetter Erection Company, Inc., 344 U. S. 178 (1952)	5
Organization For a Better Austin v. Keefe, 402 U. S. 415 (1971)	4, 5
Steffel v. Thompson, U. S. , 39 L. Ed. 2d 505 (1974)	7
Teamsters Local 695 v. Vogt, 354 U. S. 284 (1957)	8

AUTHORITIES.

UNITED STATES STATUTES:

Page

28 U.S.C.:

Section 1257(3) 2

United States Constitution:

First Amendment 7, 8

NEW YORK STATUTES:

New York Civil Practice Law and Rules:

Article 63 3

Section 6313 11

New York Civil Service Law:

Section 211 ..... 10, 11

New York Labor Law:

Section 807 ..... 10, 11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-376.

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

Petitioners,

v.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondent.

Brief of Petitioners in Reply to Opposing Brief of Respondent Central School District No. 1 of the Towns of Conklin, Binghamton, Kirkwood and Vestal, Broome County, New York.

Statement.

Respondent in its brief in opposition raises several issues that were not directly discussed in petitioners' brief in support of a petition for a writ of certiorari. These issues are discussed herein.

POINT I.

The action of the Appellate Division, Third Department, as a practical matter, did finally determine the action between the parties and is therefore reviewable by this Court under 28 U.S.C. Section 1257(3).

In practical terms, where an illegal public employee job action is alleged by a school district, there is an application made by the employer for a temporary restraining order and a preliminary injunction based on an action for a permanent injunction. Either prior or after the issuance of the preliminary injunction an agreement between the parties is reached, ending the alleged illegal job action. Since the job action is at an end, the underlying action for a permanent injunction is usually discontinued either by stipulation or through lack of further prosecution. Therefore, no strictly "final" order is usually ever entered.

The practical result is that, for all intents and purposes, the preliminary injunction is the most final order that will ever be entered in so-called strike cases. It is therefore unrealistic to believe that a final order based on the action for a permanent injunction will issue from the New York courts. If the courts are unwilling to entertain an appeal based on a preliminary injunction, there will, in effect, be no judicial review available at the highest appellate level. Thus, an appellant will be deprived of having a reviewable final order entered against him and a situation may well exist which is capable of repetition, but which evades judicial review.

Petitioners herein appealed to the New York Appellate Division, Third Judicial Department, from the lower court's order granting a preliminary injunction against petitioners. The appeal was unanimously denied. There

is no question but that petitioners undertook to obtain judicial review of the preliminary injunction granted against them.

Under the New York *Civil Practice Law and Rules*, petitioners next made a motion to the Appellate Division, Third Department, for leave to appeal to the Court of Appeals, New York's highest court. This motion was denied. Finally a motion for leave to appeal was made to the New York Court of Appeals, which also denied appeal.

Respondent at Point I (A) and (B) alleges that petitioners should have proceeded under Article 63 of the *Civil Practice Law and Rules* of New York or sought a final determination of the preliminary injunction. It is submitted, however, that these recourses were *optional.* Instead, exercising their procedural option, petitioners sought review of the preliminary injunction by appeal to the Appellate Division. The appeal was taken in lieu of moving to vacate the order of preliminary injunction, and petitioners believed thereby that the entire order would be reviewed upon appeal. An appeal of an order brings the whole of the order before the court and serves as well as a motion to vacate.

Furthermore, the manner in which the Broome County Supreme Court, Brink, J., granted the preliminary injunction—by bench decision—left no doubt that the action for a permanent injunction would have been successful. Indeed, one of the grounds for granting a preliminary injunction is the likelihood of ultimate success on the merits. The relief requested in the preliminary injunction was in almost all respects identical to that sought in the action for a permanent injunction. There is no requirement that petitioners must undertake to enforce an action for a permanent injunction, where the outcome is not in doubt.

During the hearing on the preliminary injunction, the same witnesses and the same fact patterns were presented to the lower court as would have been presented in the action for a permanent injunction. Therefore in view of the similarity of witnesses and evidence presented, there is no reason to believe that a permanent injunction would not have been granted against petitioners herein.

This Court recognized that it could review a "temporary injunction" in *Organization For a Better Austin v. Keefe*, 402 U. S. 415 (1971), quoted at page 9 of respondent's brief in opposition. Therein this Court stated:

> "Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality."

Petitioners submit that the issuance of a permanent injunction in this matter would also be little more than a formality.

Respondents also note at page 9 of their brief in opposition the case of *Bond Stores, Inc., v. Turner*, 262 App. Div. 417, 29 N. Y. S. 2d 82 (3rd Dept. 1941), as stating the law of New York State. It is submitted that that case is not opposed to the case herein presented. In the instant case there has been no attempt to have the merits of the case passed upon by the New York courts, thereby maintaining the *"status quo"* indefinitely. The parties herein have never had their day in court as to the merits, because a permanent injunction has not been and will not be sought.

Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza, 391 U. S. 308 (1968), cited by respondent at page 9 of its brief in opposition is again illustrative

of the final nature of the preliminary injunction which is before this Court on review. Therein this Court reviewed an injunction without concern of whether it was permanent or temporary because the order provided that it should remain in effect until further modification by the court; and since there was no indication that any modification affecting the issues would be before the court in the near future, the judgment was held to be clearly final for purposes of review. This is exactly the case before the Court here. Finally, the *Amalgamated* case does not stand for the proposition that picketing is constitutionally prohibited, far from it, the case stands for the proposition that although the exercise of First Amendment freedoms, may in certain instances be regulated, they may not be done away with.

Respondent cites with approval, at page 11 of its brief in opposition, *Montgomery Building and Construction Trades Council v. Ledbetter Erection Company, Inc.*, 344 U. S. 178 (1952). This case has clearly been superceded by the *Organization for a Better Austin* case and the *Amalgamated Food Employees'* case. Both of the latter cases permitted court review of a less than permanent injunction. In *Laborer's Local 438 v. Curry*, 371 U. S. 542 (1963), this Court also held that it would review a judgment of a state court with or without a final judgment, where postponing review would seriously erode national labor policy. In the case *sub judice*, there also exists a necessity for determining the instant matter without regard to its "finality." The case herein is representative of many labor cases arising in the State of New York which, save for this Court's review, would be doomed to a shadowy existence unreviewable by the courts in the absence of a final permanent injunction. It has been the experience in the public sector in this State that few, if any, permanent injunctions are ever issued in a public sector labor dispute. The cases wherein a temporary restraining order or pre-

liminary injunction has been issued have usually been concluded with the negotiation of a collective bargaining agreement. Since there is an agreement, the petitioning party, the employer, does not feel the necessity for proceeding to the permanent injunction stage. Therefore without review by this Court, the constitutionality of these injunctions would fall between the procedural cracks and important constitutional questions involving the rights of speech, assembly, and association might never be reviewed.

It is interesting to note that this Court granted certiorari in another labor case involving a temporary injunction, picketing and the First Amendment. See *American Radio Assn. v. Mobile Steamship Assn., Inc.*, No. 73-748; cert. granted 2/25/74, argued 10/16/74. Therefore the mere fact of a temporary injunction need not in and of itself deny petitioners their day in this Court.

POINT II.

The controversy presented herein is not moot, but still in active litigation.

Although respondent makes much of the fact that a contract was entered into between the parties, this is not conclusive evidence of mootness. The action complained of by petitioner is not the failure to bargain or reach agreement, but the constitutionality of a preliminary injunction granted against petitioners, restraining them in the exercise of their constitutional rights of speech, assembly and due process under law. In point of fact, the preliminary injunction has never been withdrawn by respondent, nor has the action for a permanent injunction been discontinued.

Thus there is a tangible danger existing that petitioners' speech or assembly could trigger a motion for contempt with possible criminal penalties. There also exists the chilling effect on First Amendment freedoms that a broad preliminary injunction such as the one in this case engenders. This Court has only recently recognized that the imminence of criminal prosecution may well be a live controversy deserving judicial review. *Steffel v. Thompson,* U. S. , 39 L. Ed. 2d 505 (1974).

The outstanding injunction herein may be invoked by respondent at any time. Due to its broadness it may be employed against both legal and/or illegal speech and action *indiscriminately* (see Petition Appendix F). Thus there is a continuing threat to petitioners' First Amendment rights.

Since the strike is over, there are no grounds for issuing a permanent injunction. Therefore there is no desire upon respondent's part to continue their action. If this Court holds this case moot, the peculiar fact pattern embodied in this case will evade review. This case is not unique because the same pattern is commonly employed in strikes by public employees throughout New York State.

Respondent in its opposing brief cites the case of *DeFunis v. Odegaard,* U. S. , 94 S. Ct. 1704 (1974), for the proposition that the case *sub judice* is moot. It is submitted by petitioners that this is inaccurate. DeFunis was not threatened by an existing injunction which sought to limit his right to speech and assembly. DeFunis was not harmed by the acts of the University of Washington Law School. Herein, petitioners must act under a Damoclean sword. Their very conduct may at any time incur judicial punishment. There is no time period to

this threat—it is present and threatening; it acts to chill petitioners' exercise of their First Amendment freedoms.

POINT III.

Merely because a state may act to enjoin picketing in connection with the alleged violation of a state law does not give either that state or its courts the right to extend injunctive relief in such a manner as to chill the exercise of First Amendment freedoms.

Respondent in its brief in opposition at pages 20-24 cites the cases of *Giboney v. Empire Storage and Ice Co.*, 336 U. S. 490 (1949); *Teamsters Local 695 v. Vogt*, 354 U. S. 284 (1957); *Cox v. Louisiana*, 379 U. S. 536 (1965), and *Adderley v. Florida*, 385 U. S. 39 (1966), to support its proposition that speech and assembly may be enjoined when it is ancillary to and in support of conduct which is proscribed by valid state law. In point of fact, these cases are either inapplicable or inapposite. *Giboney, supra*, involved the application of an anti-restraint of trade law against a labor union. There is no allegation that the instant conduct of petitioners represented an anti-trade restraint. Furthermore, *Giboney, supra*, concerns secondary picketing and boycott. The instant case in no manner suggests this fact pattern. In the *Vogt* case, the picketing enjoined was not picketing incident to a strike, but was picketing by a labor organization which was enjoined because employees of a business refused to join the union. In *Giboney, supra*, the picketing was not for the purpose of gaining recognition status or economic benefits from the employer, but rather to coerce the employer to recognize the union and force the employees to accept the union. This is also not the case here. In point of fact there is no evidence but that the picketing involved herein was informational rather than

coercive. Furthermore, although petitioners herein recognize that picketing may be enjoined in some situations, they argue that picketing *per se* may not be prohibited or subject to overbroad and vague injunctions jeopardizing constitutional rights and failing to satisfy the due process requirements of informing petitioners of the conduct to be proscribed.

In the *Adderley* and *Cox* cases, there was picketing on private property and patrolling and marching in the streets and highways. There is no allegation that the conduct herein was the same as in those cases. Indeed, there is no showing, and there was none made in the courts below, that petitioners' picketing and their exercise of the right to free speech materially aided or affected the strike alleged, or influenced others into observing picket lines, staying out of schools, or supporting the strike herein.

This Court is urged to uphold the cases cited by petitioners in their brief in support of petition for a writ, and to uphold the right of free speech and the right of individuals to picket either as individuals or collectively.

POINT IV.

The temporary restraining order and preliminary injunction granted against petitioners was void under New York law.

Petitioners argued in the courts below that the issuance of the temporary restraining order was void *ab initio* and that therefore it gave no jurisdiction over petitioners. Further petitioners argued that even though the restraints on free speech activity contained in the temporary restraining order were sufficient to declare it a nullity, it was also

procedurally suspect under New York law as well. In addition to being procedurally defective under the Fourteenth Amendment, it appears violative of New York's anti-injunction statute, Section 807 of the Labor Law, which provides in substance that no court or judge shall have jurisdiction to issue any injunction temporary or permanent, in a case involving a labor dispute except after a hearing and findings of certain facts specified in the statute, and may not grant relief prohibiting peaceful picketing [subdivision f(5)] and peaceably assembling [subdivision f(7)].

Section 211 of the *Civil Service Law* directs the chief legal officer of a government involved, in the event of a strike by public employees, to apply to the Supreme Court for an "injunction," which "injunction," in the absence of any further modification, description, or characterization, must be interpreted to be a permanent as opposed to a temporary or preliminary injunction, "Notwithstanding the provisions of section eight-hundred seven of the Labor Law" (Section 211) *Civil Service Law.*

Thus, it would appear that but for the exception provided in Sections 211, 807 of the *Labor Law* would apply to those employees and organizations within the coverage of the Civil Service Law. If this were not so, then there would have been no logical reason for the Legislature to include the exception in Section 211.

An exception to the general rule as expressed in Section 807 of the Labor Law, Section 211 of the Civil Service Law *must be narrowly construed, as a jurisdictional statute and limited in its application* only to applications for permanent injunctions and, conversely, inapplicable to requests for temporary injunctive relief.

That this was the intent of the legislature appears to be abundantly clear by the absence of the exception found in Section 211 in Section 6313 of the *Civil Practice Law and Rules* which forbids the issuance of a temporary restraining order in an action arising out of a labor dispute as defined in Section 807 of the *Labor Law*.

> "§6313. Temporary restraining order.
>
> "(a) Generally. If, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice. Upon granting a temporary restraining order, the court shall set the hearing for the preliminary injunction at the earliest possible time. *No temporary restraining order may be granted in an action arising out of a labor dispute as defined in section eight hundred seven of the labor law,* nor against a public officer, board or municipal corporation of the state to restrain the performance of statutory duties * * *." (Italics supplied.)

If the "injunction" referred to in Section 211 of the *Civil Service Law* was meant to include temporary restraining orders, then the legislature would certainly have amended Section 6313 of the *CPLR* to exclude the restraint upon the issuance of a temporary restraining order in labor disputes in the case of labor disputes involving public employees.

Furthermore, Section 807 of the *Labor Law* in no way indicates that it is inapplicable to labor disputes involving public employees.

It is, therefore, submitted that the *ex parte* temporary restraining order herein insofar as it was granted in an

action arising out of a labor dispute was also void as violative of Section 807 of the *Labor Law* of the State of New York.

CONCLUSION.

For the reasons cited in petitioners' petition for a writ of certiorari and those cited herein, this Court should grant certiorari.

Dated: November 18, 1974.

Respectfully submitted,

BERNARD F. ASHE,
Counsel for Petitioners,
80 Wolf Road,
Albany, N. Y. 12205
(518) 459-5400.

JAMES R. SANDNER,
ROCCO A. SOLIMANDO,
IVOR R. MOSKOWITZ,
Of Counsel.